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No. 07-1427

SEP 23 2008

IN THE

Supreme Court of the United States

UFO CHUTING OF HAWAII, INC., *et al.*,
Petitioners,

v.

LAURA H. THIELEN, CHAIR AND ACTING DIRECTOR OF THE BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court consider whether a Hawaii law regulating parasailing is preempted by the Marine Mammal Protection Act, 16 U.S.C. §§ 1361 *et seq.*, when that question was neither presented to nor considered by the court of appeals?

2. Are petitioners entitled to attorney's fees pursuant to 42 U.S.C. § 1988 where judgment in their favor was set aside based on a change in federal law before the judgment materially altered the legal relationship between the parties or benefited petitioners in any way?

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BRIEF FOR RESPONDENTS IN OPPOSITION

The petition should be denied for several independent reasons. First, this case does not properly present the questions on which petitioners seek certiorari. Petitioners first ask this Court to review whether the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §§ 1361 *et seq.*, preempts Hawaii's seasonal ban on parasailing in certain waters off the coast of Maui. Before the Ninth Circuit, however, petitioners asserted the preemptive effect only of their federal Coast Guard licenses, not of the MMPA. Petitioners then ask the Court to determine whether the enactment of legisla-

tion mooting a final judgment deprives a party of its status as a "prevailing party" for purposes of obtaining attorney's fees under 42 U.S.C. § 1988. But on this question the court of appeals *agreed* with petitioners that subsequent legislation need not deprive a party of its "prevailing party" status. *See* Pet. App. 13a-14a. The court of appeals instead ruled that petitioners were properly denied attorney's fees for a different reason: because they did not receive "a direct and substantial benefit from [their] initial award of a permanent injunction." *Id.* at 14a. Petitioners do not even clearly challenge that holding.

Quite apart from these threshold obstacles to review, the decision below was correct and does not conflict with any decision of another court of appeals. Further review is not warranted.

STATEMENT OF THE CASE

1. In 1990, in part in an effort to protect the mating grounds of endangered humpback whales, the Hawaii legislature passed a statute prohibiting certain activities, including parasailing, in a small area of near-shore navigable waters off the west and south coasts of Maui from December 15 to May 15. *See* Haw. Rev. Stat. §§ 200-37(i), 200-38(c) (1993); Haw. Admin. R. § 13-256-112.

Petitioners operate parasailing businesses. Their two parasailing vessels are licensed by the Coast Guard to carry up to twelve passengers in "coastwise" trade on the west coast of Maui. Pet. App. 2a-3a. The State's seasonal ban on parasailing prevents petitioners from conducting their parasailing business in the protected waters from December 15 to May 15. State law does not prohibit petitioners from conducting their parasailing business elsewhere during this period; State law

does not prohibit petitioners from entering the protected waters for activities not covered by the ban; and State law does not prohibit petitioners from conducting their parasailing business in the protected area at other times of the year. *See* Haw. Rev. Stat. §§ 200-37(i), 200-38(c) (1993); Haw. Admin. R. § 13-256-112.

2. On November 28, 2003, more than 13 years after the State law became effective, petitioners filed a complaint in the United States District Court for the District of Hawaii seeking a determination on various grounds that the State law was preempted by federal law. Pet. 12.

On July 9, 2004, the district court granted summary judgment for petitioners, solely on the ground that the State's parasailing ban was preempted by the MMPA. *UFO Chuting of Hawaii, Inc.* v. *Young*, 327 F. Supp. 2d 1220, 1229-1230 (D. Haw. 2004). The court issued a permanent injunction barring enforcement of the State law on September 29, 2004 and entered judgment on October 1. Pet. App. 3a. The State appealed to the Ninth Circuit.

3. Congress then passed the Fiscal Year 2005 Omnibus Appropriations Bill, H.R. 4818, which President Bush signed into law on December 8, 2004. Pub. L. No. 108-447, 118 Stat. 2809, 2809. Section 213 clarifies that the MMPA does not preempt Hawaii laws that regulate boating to protect whales. It provides:

> Hereafter, notwithstanding any other Federal law related to the conservation and management of marine mammals, the State of Hawaii may enforce any State law or regulation with respect to the operation in State waters of recreational and commercial vessels, for the purpose of conservation and management of

> humpback whales, to the extent that such law or regulations is no less restrictive than Federal law.

Id. at 2884.

The next day (December 9, 2004), the State filed motions asking the district court to stay the injunction and to indicate whether it would entertain a motion to alter the judgment pursuant to Federal Rule of Civil Procedure 60(b) on remand. On December 13, the court stayed the injunction and indicated its willingness to reconsider the judgment. Pet. 14; Pet. App. 4a.

All this occurred before the State's seasonal ban on parasailing in the protected waters took effect on December 15. Because the district court stayed the injunction before December 15, petitioners were not able to benefit from the injunction by parasailing for even one day of the seasonal ban period.

After a formal remand from the Ninth Circuit and additional briefing,[1] the district court ruled in favor of the State and denied petitioners' request for fees. The court found that Section 213 was constitutional and rendered the parasailing ban no longer preempted by the MMPA. Pet. App. 24a. The court found that petitioners were not entitled to attorney's fees because they had not benefited from the permanent injunction, which the court had stayed before the ban took effect on December 15. *Id.* at 54a-55a.

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[1] Petitioners' additional briefing in the district court included a claim that Section 213 is unconstitutional. The United States intervened to defend the law. The district court rejected the argument. Petitioners did not pursue this issue in the Ninth Circuit.

4. Petitioners timely appealed to the Ninth Circuit. The sole basis for their appeal on the merits was their contention that State law was preempted by the Coast Guard licensing scheme codified at 46 U.S.C. §§ 2101 *et seq.* Petitioners did not appeal the district court's ruling that, in light of the recently enacted Section 213, the MMPA did not preempt State law. *See* Plaintiffs-Appellants' Opening C.A. Br. 18-19 (discussing the preemptive effect of federal licenses, not of the MMPA), *available at* 2005 WL 4155371.

The Ninth Circuit affirmed. The court found that State law did not "completely exclude" UFO's right to operate vessels under its federal maritime coasting licenses "or actually conflict with federal law." Pet. App. 8a. The court also found that the State law was a reasonable and non-discriminatory regulation of the federal licenses. *Id.* at 8a-13a.

As to petitioners' right to attorney's fees under 42 U.S.C. § 1988, the court of appeals acknowledged that the subsequent statutory change created by Section 213 did not by itself prevent UFO from being a "prevailing party." Pet. App. 14a. Nevertheless, "[b]ecause the district court stayed the implementation of the permanent injunction before the State had to change its behavior—before Hawaii stopped enforcing its parasailing ban," the Ninth Circuit determined that UFO had never received "a direct and substantial benefit" from the award of the permanent injunction. *Id.* at 14a-15a. It was on this basis that the court concluded that petitioners could not be considered "prevailing parties" within the meaning of Section 1988.

REASONS FOR DENYING THE PETITION

I. THE MMPA PREEMPTION QUESTION WAS NEITHER PRESENTED TO NOR PASSED UPON BY THE COURT OF APPEALS, IT HAS NOT OCCASIONED ANY CONFLICT IN THE LOWER COURTS, AND THE DISTRICT COURT CORRECTLY RESOLVED IT IN THE STATE'S FAVOR

The petition should be denied first and foremost because it seeks review of a question that was neither presented to nor passed upon by the court of appeals. *See, e.g., City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts."); *Delta Airlines* v. *August*, 450 U.S. 346, 362 (1981) ("Although defendant's petition for certiorari presented the question of the District Judge's abuse of discretion in denying defendants costs under Rule 54(d), that question was not raised in the Court of Appeals and is not properly before us.").

Petitioners frame their first "Question Presented" as follows:

> Does Hawaii's five-month seasonal ban on parasailing in navigable (federal) waters off Maui's coast violate the Supremacy Clause because it furthers neither the purposes nor the objectives of the federal Marine Mammal Protection Act, 16 U.S.C. § 1379(a), the predominant federal regime enacted by Congress in 1972 for the safety and well being of humpback whales?

Pet. *i*.

Petitioners did not argue this question in the court of appeals. In that court, they acknowledged and did not dispute the district court's ruling that "section 213

altered the preemptive effect of the MMPA by resolving the conflict with the [parasailing] Ban." Plaintiffs-Appellants' Opening C.A. Br. 2 (citing district court decision). The State's answering brief similarly noted that "Plaintiff's only theory on appeal is that State law actually conflicts with their federal coastwise licenses. ... [Although] plaintiffs originally prevailed below on the basis of a conflict with the MMPA ... [t]hey ... do not pursue that claim on appeal." Defendants-Appellees' Answering C.A. Br. 7 & n.5, *available at* 2005 WL 4668591.

Unaccountably, petitioners now try to revive their abandoned MMPA claim in this Court. But petitioners fail to advise this Court that they did not argue the point in the court of appeals. Nor do they explain why this Court should address an issue not briefed or argued to the court of appeals and not discussed in that court's decision.

In any event, even if petitioners had properly preserved their MMPA preemption argument, this Court's review would still be unwarranted. First, petitioners identify no conflict among the lower courts as to the MMPA's preemptive effect, and the State is aware of none.

Second, the district court was correct in holding that Section 213 of the Fiscal Year 2005 Omnibus Appropriations Bill precludes any claim that the MMPA preempts Hawaii's seasonal parasailing ban.

Section 213 provides that "notwithstanding any other Federal law related to the conservation and management of marine mammals, the State of Hawaii may enforce any State law or regulation with respect to the operation in State waters of recreational and commercial vessels, for the purpose of conservation and man-

agement of humpback whales." Pub. L. No. 108-447, 118 Stat. at 2884.

"[A]ny other federal law related to the conservation and management of marine mammals" plainly includes the MMPA, the central function of which is to regulate the conservation and management of marine mammals. Just as plainly, the State's seasonal ban on parasailing constitutes a "State law or regulation with respect to the operation in State waters of recreational and commercial vessels, for the purpose of conservation and management of humpback whales." In enacting Section 213, as the district court correctly held, Congress thus exempted the State's seasonal parasailing ban from the MMPA's preemptive effect.

Remarkably, petitioners do not even mention Section 213 in the argument section of their petition. Rather than discussing Section 213 and Congressional purpose, "the ultimate touchstone" of preemption, *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks Int'l Ass'n* v. *Schermerhorn*, 375 U.S. 96, 103 (1963)), petitioners attempt to distract the Court with talk of heightened scrutiny for state statutes that conflict with federal fields of interest.

Petitioners once again confuse the issue. The court of appeals discussed the appropriate level of deference to afford state legislatures when reviewing statutes that do *not* conflict with federal law. Pet. App. 8a-9a. That question arose in the context of the only issue before the court—the preemptive effect of the petitioners' Coast Guard licenses. It has nothing to do with the MMPA preemption question petitioners now urge on this Court.

II. The Denial Of Attorney's Fees Involved A Straightforward Application Of This Court's Precedents

In their second question presented, petitioners ask this Court to consider whether "enactment of legislation mooting a judgment ... deprive[s] the prevailing party, here petitioners, of the right to attorney's fees under 42 U.S.C. § 1988." Pet. *i*. But the court of appeals answered that question in petitioners' favor, finding that "the subsequent statutory change" did not by itself "undermine UFO's status as a [potential] prevailing party." Pet. App. 14a. Instead, the court of appeals upheld the denial of attorney's fees for an independent reason:

> [t]he entry of judgment in a party's favor does not automatically render that party a "prevailing party" under § 1988. *Rhodes v. Stewart*, 488 U.S. 1, 3, 109 S. Ct. 202, 102 L. Ed. 2d 1 (1988) (per curiam). The judgment is not the end but a means to receiving some redress from the defendant. *Id.* To be considered a "prevailing party," the plaintiff must show that the judgment somehow affected the behavior of the defendant towards the plaintiff.

Pet. App. 14a. Because the injunction was overturned two days before it would have taken effect, the court held, petitioners "did not receive a direct benefit" from it. *Id.* at 15a.

The petition does not clearly challenge that basis for the denial of a fee award. And petitioners' claims of a circuit conflict are without merit because they rest on a similarly confused view of the relevant legal question. In each of the cases petitioners cite as evidence of such a conflict, the plaintiffs were found to be entitled to at-

torney's fees precisely because, unlike petitioners here, they actually enjoyed substantial benefits from the initial remedies they achieved even though those remedies were later overturned or rendered moot.

In *Watson* v. *County of Riverside*, 300 F.3d 1092 (9th Cir. 2002), for example, the plaintiff obtained a preliminary injunction prohibiting introduction of certain evidence in an administrative proceeding. Although he lost the case two years later, by the time the case was resolved, "the administrative hearing had long since come and gone," *id.* at 1094, and the preliminary injunction had successfully prevented introduction of the evidence the plaintiff had sought to keep out.

In *Balark* v. *City of Chicago*, 81 F.3d 658 (7th Cir. 1996), the plaintiffs obtained a consent decree that controlled how the city had to pay out tort judgments for ten years before it was dissolved.

In *Coalition for Basic Human Needs* v. *King*, 691 F.2d 597 (1st Cir. 1982), the plaintiffs attained the "temporary and provisional relief" that was the "primary object" of their appeal. *Id.* at 601. Similarly, in *Hyundai Motor America* v. *J.R. Huerta Hyundai, Inc.*, 775 F. Supp. 915 (E.D. La. 1991), the plaintiffs obtained "the primary relief sought," first through a preliminary injunction barring the state from holding certain administrative proceedings in a manner the plaintiffs claimed was biased against them and then through state legislation doing away with the objectionable feature of the proceedings. *Id.* at 917.

Finally, in *Gerling Global Reinsurance Corp. of America* v. *Garamendi*, 400 F.3d 803, *amended on other grounds*, 410 F.3d 531 (9th Cir. 2005), the Ninth Circuit applied exactly the standard applied here in finding that the plaintiffs were entitled to attorney's

fees. Because they had "directly benefited" from an injunction barring the State from enforcing a statute requiring insurance companies to provide certain information, they had prevailed and merited an award of attorney's fees. *Id.* at 806-807.

In each of these cases, the plaintiffs benefited from the relief they sought, for at least some period. Here, by contrast, the short-lived injunction never required the State to alter its behavior towards petitioners, and petitioners thus received no benefit from it. The court of appeals, like the district court, was thus correct in ruling that they were not entitled to attorney's fees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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